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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 380

ANDREW KENNY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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CITATIONS

CASES:

Stringer v. *U. S.*, 117 C. Cls. 30 ..... 5, 6
Taylor v. *U. S.*, 131 C. Cls. 387 .....3, 4, 6, 7
Wittner v. *U. S.*, 110 C. Cls. 231 ..... 4, 6

STATUTES:

Veterans' Preference Act of 1944, c. 287; 58 Stat. 387, as amended:
Sec. 14 (5 U. S. C., 1952 ed., Sec. 863).....2, 7, 16a

REGULATIONS:

Civil Service Regulation 22.2(c) (1949), 5 CFR 22.2 (c) (1949 ed.) 17a

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on March 6, 1956.

CITATIONS TO OPINION BELOW

The opinion of the Court of Claims, printed in Appendix B hereto, infra, p. 1a, is not yet reported in the Court of Claims reports.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1956, R. 71. Rehearing was denied on June 5, 1956. R. 74. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255 (1).

QUESTION PRESENTED

Whether the discharge of a veterans' preference eligible is invalid because he is removed from active duty status, separated from the payroll and placed on involuntary annual leave during the thirty days' notice period where the statute requires that every preference eligible "shall have at least thirty days advance written notice" of proposed adverse action?

STATUTES INVOLVED

The statutory provisions involved are Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, as amended; 61 Stat. 723; 5 U.S.C., 1952 ed., Sec. 863. They are printed in Appendix C, infra, p. 16a.

REGULATION INVOLVED

The Civil Service Regulation involved, 5 CFR 22.2 (c) 1949 ed., is printed in Appendix C, infra, p. 16a.

STATEMENT

Invoking jurisdiction of the Court under 28 U.S.C., 1952 ed., Sec. 1491, plaintiff filed suit against the United States in the Court of Claims on March 24, 1955, for loss of pay arising from his alleged wrongful dismissal as a civil service employee, plus the difference in salary between Grade P/3 and Grade P-4/GS 11 from September, 1949 to April, 1951 on the grounds

that during that period, he had performed duties of the higher grade while being paid at the rate of the lower. The Government answered and subsequently filed a Motion for Summary Judgment. The plaintiff filed a cross-motion for summary judgment and the Court decided the case on the motions. The facts pertinent to this petition were not in dispute in the Court below and are as follows: Plaintiff was a veterans' preference eligible employed in the Veterans' Administration in Washington, D. C. On May 12, 1953, he was given notice of proposed removal, charging him with insubordination and advising him that if the charges were sustained, the removal would be effective in not less than thirty days. Said notice also stated that plaintiff was being administratively placed on annual leave on May 13, 1953, the day following the notice. Having found that the specifications of the charges had been sustained, the Veterans' Administration accomplished plaintiff's removal on June 12, 1953, with appropriate notification to him. Thereupon, plaintiff appealed to the Civil Service Commission, which affirmed the removal action.

The Court of Claims granted the Government's Motion for Summary Judgment except as to plaintiff's salary during the thirty days' notice period, holding that plaintiff's rights had been plainly violated when the thirty days' notice period had been deducted from his annual leave to which he was entitled upon separation. Accordingly, the Court below, two judges dissenting, granted plaintiff's motion to the extent of awarding him thirty days' salary, on the authority of the Court's decision in *Taylor* v. *United States,* 131 Ct. Cls. 387, decided April 5, 1955,[1] the dis-

[1] For convenience, the opinion of the Court of Claims in the *Taylor* case is printed in Appendix B, infra, p. .

sent being by the same judges and for the same reasons as the dissent in the above cited case. The Court held in the *Taylor* case, supra, that the statutory requirement of "* * * thirty days' advance written notice * * *" (Section 14, Veterans' Preference Act, 58 Stat. 387, 390, as amended, 61 Stat. 723; 5 U.S.C. 863 (1952 ed.)) means "* * * that he shall have 30 days' notice in advance of his discharge, which means in advance of his being separated from the payroll * * *." *Taylor* v. *United States*, 131 Ct. Cls. 387, 391. Having found that the plaintiff therein had been separated from the payroll *eo instante*, the Court ruled invalid the regulation purporting to authorize such action, but, nevertheless, upheld the removal and awarded him only thirty days back pay instead of the back pay to which he would have been entitled had the discharge been declared void.

REASONS FOR GRANTING THE WRIT

1. The Rulings of the Court Below in the Instant Case and in Taylor v. United States, on Which the Opinion is Based, Conflict With the Court's Long Standing Rule That the Procedure Provisions of the Veterans' Preference Act Are Mandatory and Require Strict Compliance

The decisions of the Court of Claims in the instant case and the *Taylor* case, supra, signify a clear-cut departure from the Court's long established ruling that procedure provisions of the Veterans' Preference Act are mandatory and that strict compliance is required if the removal is to be valid and effective. In the case of *Wittner* v. *United States*, 110 Ct. Cls. 231 (1948), the Court below held:

> "We held in the case of *Elchibegoff* v. *United States*, 106 C. Cls. 541, that the procedure provisions of the Act of 1912 in respect to charges

against civil service employees were mandatory. To hold otherwise would be to hold that Congress was merely engaging in mental exercises when it enacted such provisions. They were enacted for the protection of civil service employees against arbitrary action by officials." [p. 233]

* * *

"If the procedure provisions are not mandatory they are largely meaningless. The officials could act as if such provisions were never put into the law. . . ." [p. 234]

* * *

"The language is clear. It does not prevent a discharge, if the procedure is followed, but it does forbid a discharge unless it is followed." [p. 234]

* * *

"It places no undue burden on any official, even though he might prefer to choose his own method. But the procedure has been set out in the law. It is simple, easy to follow, and protects both the veteran and the Government. It should be followed." [p. 236]

In *Stringer* v. *United States,* 117 Ct. Cls. 30 (1950), the preference eligible had been given 29 days advance notice of proposed reduction in grade instead of 30 days. The action was declared invalid by the Court of Claims which said:

"We hold that plaintiff did not receive 'at least thirty days advance written notice' as required by the act. He received notice on August 17, 1944, informing him that 'effective 16 September 1944, the grade and salary of your position will be reduced.' In computing the thirty day period, the day on which the notice was given is regarded as an entirety, or a point of time, and is excluded. * * * Furthermore, thirty *full* days

of notice are required; and the period of notice therefore had to extend to the last minute of the thirtieth day, which was September 16. * * * [p. 48]

* * * Nor can we accept defendant's contentions that plaintiff must show wherein he was harmed by the insufficiency of the notice period and that the doctrine of *de minimis non curat lex* applies here. We cannot construe a statute that plainly says 'at least thirty days' as meaning 'not quite thirty days'. *The requirements of Section 14 are specific and mandatory. Neither this court, nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required.*" [p. 49] [Emphasis supplied]

In the instant case and the *Taylor* case, the Court reasons that petitioner's right to answer the removal charges was safeguarded and that he was not harmed by deprivation of his pay during the thirty days' notice period. We submit that this is completely unrealistic. Such reasoning totally ignores the fact that petitioner has to pay his living expenses, hire counsel to defend him and to be relieved from the time-consuming task of job hunting during the thirty days' notice period in order to properly prepare his defense. Indeed, it is difficult to understand how the same Court that decided the *Stringer* case and the *Wittner* case could have reached the conclusion in the instant case. In the *Stringer* case, the Court below held the removal null and void because the employee was afforded twenty-nine days' notice instead of thirty. Stringer was deprived of only one day's pay. Petitioner herein was denied pay for thirty days. To conclude that prejudice to Stringer was clearly present because it involved denial of one day of "time to prepare" and

that prejudice to petitioner is absent because only deprivation of his pay for thirty days, his "wherewithal to prepare", was involved, and to refuse relief to petitioner after granting it to Stringer, is to abandon the philosophy of the Court as reflected in the past in setting aside removal actions where they are in any way procedurally defective. It constitutes a reversal of the Court's previous holdings that the principle of *de minimis non curat lex* does not apply to the procedural provisions of Sec. 14 of the Veterans' Preference Act, supra. It substitutes a test of "substantial compliance" for the previous requirement of "strict compliance" and, in practical effect, shifts the burden to the preference eligible to show that he was actually prejudiced or harmed by the Agency's failure to comply with the statutory procedures. Imposing such a burden on the employee is in conflict with the statute and is a serious encroachment on the rights of veterans' preference eligibles. In this case, petitioner, relying on the Court's previous decisions, was misled into believing he had no such burden of proof and the Court, disposing of the case on cross-motions for summary judgment without taking evidence, illogically assumed that he had not been harmed because it was only *money* that he had been denied. This seems especially inappropriate for the Court of Claims.

2. This Case Raises an Important and Novel Question in the Administration of the Veterans' Preference Act That Merits Review by This Court

The matter of employees' rights in removal, reduction or suspension cases under the Veterans' Preference Act is thoroughly confused by the decisions of the Court of Claims in the instant case and in *Taylor*

v. *United States, supra.* Heretofore, strict compliance with the procedure provisions of the statute had been required. Now, it appears that only substantial compliance is necessary and that the preference eligible must show wherein he has been damaged or prejudiced by the Agency's failure to adhere to the statutory procedure. If allowed to stand, these rulings will permit gradual erosion of employees' rights under the Act and inevitably result in serious harm to vast numbers of Federal workers. Since this question is of such vital importance in the administration of the Government Civil Service, it is hoped that the United States will join in this petition in order to obtain from this Court a clear guide to agency personnel action in the future. Therefore, we believe that review by this Court is essential.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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Dated: August 31, 1956